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Environmental Integrity Project v. McCarthy

Lindsay Ward

Alexander Blewett III School of Law at the University of Montana, linzpward@gmail.com

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***Environmental Integrity Project v. McCarthy*, No. 13-1306 (RDM), ___ F. Supp. 3d ___, 2015 U.S. Dist. LEXIS 131653, 2015 WL 5730427 (D.D.C. Sept. 29, 2015)**

Lindsay P. Ward

In addition to stocking grocery stores and restaurants with beef, chicken and milk, CAFOs generate another product—manure. The EPA’s decision to withdraw a proposed rule compelling CAFOs to provide information to aid the agency in regulating their discharge of pollutants into the waters of the United States was upheld by the United States District Court for the District of Columbia. The court concluded that the EPA’s decision was “adequately explained” and “coherent,” supported by the administrative record, and did not conflict with existing law.

I. INTRODUCTION

Environmental Integrity Project v. McCarthy addressed the Environmental Protection Agency’s (“EPA”) decision to withdraw a proposed rule requiring concentrated animal feeding operations (“CAFOs”)¹ to provide the agency with information that would assist the agency in regulating pollutants discharged into United States waters under the Clean Water Act (“CWA”).² Five non-profit organizations (“Plaintiffs”) asserted that the EPA’s decision to withdraw the proposed rule after the notice and comment period was “arbitrary and capricious,” as the evidence contradicted the agency’s conclusion violating the Administrative Procedure Act (“APA”).³ After finding Plaintiffs had standing, the court reviewed the agency decision under the APA and concluded that the EPA’s withdrawal was “adequately explained.”⁴ Next, the court evaluated the EPA’s decision in light of the administrative record.⁵ The Plaintiffs’ final claim that the withdrawal conflicted with the EPA’s mandate under the CWA was dismissed as a misunderstanding of responsibilities imposed by the CWA.

II. FACTUAL BACKGROUND

Enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” the CWA seeks to safeguard a valuable

¹ CAFOs are defined primarily as an animal feeding operation (“AFO”), an operation that holds animals for forty-five days or more within a twelve-month period. 40 C.F.R. § 122.23(b)(1). CAFO is an AFO that is either medium or large in quantity of animals in the facility or is “a significant contributor of pollutants to waters of the United States.” *Id.* §§ 122.23(b)(2), (c).

² *Envtl. Integrity Project v. McCarthy*, No. 13-1306 (RDM), ___ F. Supp. 3d ___, 2015 U.S. Dist. LEXIS 131653, at *2 (D.D.C. Sept. 29, 2015).

³ *Id.* at *2-3.

⁴ *Id.* at *31, *38.

⁵ *Id.*

resource.⁶ “The discharge of any pollutant” is forbidden.⁷ This definition encompasses “any addition of any pollutant to navigable waters from any point source.”⁸ Point sources include “any discernible, confined and discrete conveyance, including but not limited to . . . concentrated animal feeding operation[s].”⁹ A cornerstone of the CWA is the National Pollutant Discharge Elimination System (“NPDES”), which was created in part to solve the failings of previous federal water pollution laws. This program prohibits discharge unless the point source, such as a CAFO, has received a permit.¹⁰ NPDES permits are issued either by the EPA or by state agencies under the EPA’s delegated authority.¹¹

CAFOs have been subject to regulation by the EPA for years; these industrial farms are major water polluters and have a detrimental effect on both human health and the environment.¹² In 2003, the EPA conducted a study that found that animals raised in CAFOs produce over three times the “amount of raw waste” that all the humans in the United States produce, and approximately sixty percent of all manure produced by farms confining animals.¹³ Environmental damage caused by CAFOs pollutants includes algal blooms, which are responsible for killing fish and producing dead zones.¹⁴ There are over forty diseases found in manure that can infect humans; this fecal matter often contains “heavy meals, as well as antibiotics, growth hormones, and pharmaceutical agents administered to livestock.”¹⁵ Notwithstanding these effects, and decades of regulation under the NPDES program, the EPA does not have a “comprehensive understanding of the number, location, and permitting status of [CAFOs] in the United States.”¹⁶

Motivated by these concerns, the EPA promulgated a rule in 2003 that created a “mandatory duty for all CAFOs to apply for a NPDES permit.”¹⁷ This rule was struck down by the United States Court of Appeals for the Second Circuit, which concluded the EPA had overstepped its authority by compelling all CAFOs to obtain permits.¹⁸ The court determined that the EPA could not require CAFOs that did not discharge pollutants to undergo this process.¹⁹ The

⁶ 33 U.S.C. § 1251(a) (2012).

⁷ 33 U.S.C. § 1311 (2012).

⁸ 33 U.S.C. § 1362(12) (2012).

⁹ *Id.* § 1362(14).

¹⁰ *Id.* § 1342.

¹¹ *Id.* § 1251(b).

¹² *Envtl. Integrity Project*, 2015 U.S. Dist. LEXIS 131653, at *3.

¹³ *Id.* (citing National Pollutant Discharge Elimination System Concentrated Animal Feeding Operations Reporting Rule, 76 Fed. Reg. 65431, 65431 (Oct. 21, 2011)).

¹⁴ *Id.* (citing 76 Fed. Reg. at 65432.)

¹⁵ *Id.* (citing 76 Fed. Reg. at 65434.)

¹⁶ *Id.* at *4

¹⁷ National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176 (Feb. 12, 2003).

¹⁸ *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 489, 504 (2d. Cir. 2005)

¹⁹ *Id.* at 524.

EPA proposed a second rule, allowing CAFOs to voluntarily state that they did not anticipate or currently discharge pollutants and thereby could bypass the permitting process.²⁰ Vacated again by the court the EPA stated in the settlement agreement that it would propose a rule “that would require CAFOs to provide certain information.”²¹ Under § 308 of the CWA, the EPA is given expansive power to discover information to achieve the purpose of the CWA.²² Section 308 permits the EPA to set forth rules compelling a point source to “submit information to the EPA or by surveying point sources without formal rule-making.”²³

Following the settlement agreement, the EPA proposed two rules in October 2011.²⁴ The rule relevant to the instant case was labeled the “Information Rule,” and would require all CAFOs to submit to the EPA “contact information, location of the CAFO’s production area, NPDES permitting status, number, and type of animals, and number of acres available for land application.”²⁵ The EPA also set out three “alternative approaches.”²⁶ The EPA eventually adopted the first alternative.²⁷ Under this approach, the EPA would examine current data sources including the United States Department of Agriculture (“USDA”), state NPDES permitting programs, and satellite imagery to gather information necessary to properly permit CAFOs.²⁸ On July 20, 2012, the EPA took final agency action and withdrew the Information Rule, determining it would utilize the first alternative and “collect CAFO information using existing sources of information.”²⁹

III. PROCEDURAL BACKGROUND

Plaintiffs challenged the EPA’s decision to withdraw the Information Rule in the D.C. District Court.³⁰ The Plaintiffs alleged that the EPA’s decision was “arbitrary and capricious in violation of the APA,” as it “lacks clear reasoning, runs counter to the evidence in the administrative record, and constitutes a clear error in judgment.”³¹ The district court denied Plaintiffs’ motion for summary judgment.

²⁰ Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70418, 70426 (Nov. 20, 2008).

²¹ 76 Fed. Reg. at 65435.

²² 33 U.S.C. § 1318(a) (2012).

²³ *Envtl. Integrity Project*, 2015 U.S. Dist. LEXIS 131653, at *9.

²⁴ *Id.* at *4.

²⁵ 76 Fed. Reg. at 65436.

²⁶ *Id.* at 65445.

²⁷ *Envtl. Integrity Project*, 2015 U.S. Dist. LEXIS 131653, at *15.

²⁸ *Id.* at *16-18.

²⁹ 77 Fed. Reg. at 42679.

³⁰ *Envtl. Integrity Project*, 2015 U.S. Dist. LEXIS 131653, at *1.

³¹ *Id.* at *2-3.

IV. ANALYSIS

The standard of review applied to the EPA's decision to withdraw a proposed rule falls under the APA.³² The EPA's decision is given more deference than "a decision to promulgate a new rule or to rescind an existing one."³³ The court will vacate the EPA's decision if it examined factors Congress did not intend to have weighed, if its decision relied on evidence that conflicts with the evidence presented, or ventures into the realm of improbability.³⁴ An agency is permitted to withdraw a proposed rule as long as the decision is the result of "reasoned decisionmaking."³⁵

A. Was the EPA's Withdrawal "Adequately Explained?"

The court first addressed whether the EPA's "path may reasonably be discerned" and the decision sufficiently justified.³⁶ The EPA determined that the existing information approach would garner "much of the desired CAFO information."³⁷ In withdrawing the rule, the EPA stated it could redistribute resources that would have been used to promulgate the rule to instead examine current information and discover CAFOs lacking permit coverage.³⁸ Additionally, the EPA would work in conjunction with state and federal agencies to collect information; a collaboration that would likely be fruitful as these agencies have existing relationships with CAFOs.³⁹ Finding that "[l]imited Agency recourses warrant a targeted approach that will result in the greatest impact on water quality" and the method chosen by the EPA would likely produce some of the information sought, the court concluded that the EPA "adequately explained" its rationale.⁴⁰

B. Does the Administrative Record Affirm the EPA's Withdrawal?

Plaintiffs asserted that the EPA's contention that existing sources would provide much of the required CAFO information lacked a foundation in the

³² *Williams Nat'l Gas Co. v. FERC*, 872 F.2d 438, 443 (D.C. Cir. 1989).

³³ *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 43 (D.C. Cir. 2004).

³⁴ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins Co.*, 463 U.S. 29, 43 (1983).

³⁵ *Williams Nat. Gas Co.*, 872 F.2d at 444.

³⁶ *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys.*, 419 U.S. 281, 286 (1974)).

³⁷ 77 Fed. Reg. at 42681.

³⁸ *Envtl. Integrity Project*, 2015 U.S. Dist. LEXIS 131653, at *34.

³⁹ 77 Fed. Reg. 42681.

⁴⁰ *Envtl. Integrity Project*, 2015 U.S. Dist. LEXIS 131653, at *37 (citing Joint Appendix at 37, *Envtl. Integrity Project v. McCarthy*, 2015 U.S. Dist. LEXIS 131653 (D.D.C. Sept. 29, 2015) (No. 13-1306 (RDM))).

administrative record.⁴¹ Examining both permitted and unpermitted CAFOs, the district court held that there was ample supporting evidence in the record.⁴² The EPA administers NPDES programs for four states and, consequently, already possesses the information the proposed Information Rule sought to gather.⁴³ The EPA concluded that the remaining NPDES self-regulated forty-six states would offer the information, finding “it can obtain much of the desired CAFO information” from this existing source.⁴⁴ The court agreed with Plaintiffs that unpermitted CAFOs were the most challenging category, stating “that the record reveals significant obstacles to using existing data sources to compile a comprehensive database.”⁴⁵ However, the court determined that the record supported the EPA’s declaration that it could find some information on unpermitted CAFOs.⁴⁶

The court dismissed Plaintiff’s argument that alternatives existed, stating that it declined to “second-guess the [EPA’s] policy judgments about which tools are most likely to work.”⁴⁷ The court further found that the record supported the EPA’s contention that the withdrawal of the Information Rule was a “reasonable next step towards a more complete solution.”⁴⁸ While Plaintiffs stated that the EPA failed to fully express how withdrawing the rule was a permissible step towards the final goal of a complete informational archive, the court found the EPA did delineate its objective and the methods that would be used.⁴⁹ The court acknowledged that Plaintiffs’ final argument that the Informational Rule would not have been too demanding was likely accurate.⁵⁰ While the EPA estimated that it would only take an hour to find and enter the required information by the CAFOs, the court stated, “no approach is free of substantial burdens” related to effectiveness and “resource allocation.”⁵¹

C. Is the Withdrawal Contrary to Law?

Plaintiffs’ last claim was that the final decision contradicted the EPA’s mandate under the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁵² The court dismissed this claim as overbroad, noting that prior decisions did not advocate all agency action to “be measured against the relevant statutes that the agency enforces.”⁵³ The court

⁴¹ *Id.* at *38.

⁴² *Id.* at *46-47.

⁴³ *Id.* at *40.

⁴⁴ *Id.* at *39.

⁴⁵ *Id.* at *43.

⁴⁶ *Id.*

⁴⁷ *Id.* at *48.

⁴⁸ *Id.* at *49-50.

⁴⁹ *Id.* at *51.

⁵⁰ *Id.* at *53.

⁵¹ *Id.* at *54, 52.

⁵² 33 U.S.C. § 1251(a); *see Env'tl. Integrity Project*, 2015 U.S. Dist. LEXIS 131653, at *55-56.

⁵³ *Env'tl. Integrity Project*, 2015 U.S. Dist. LEXIS 131653, at *56.

determined that there was no requirement that all CAFOs “self-report,” and the statute gave the EPA the authority to select the information it deemed it might rationally need.⁵⁴ Deferring to the EPA, the district court declined to impose its findings in place of the agency’s judgment.⁵⁵

V. CONCLUSION

Under the directives of the CWA, the EPA is given broad authority to require information it finds necessary under § 308. While this case may underscore deference by the courts to agency action, the decision will likely be appealed. Should an appeal be heard, it is probable the EPA will have to offer up additional evidence to show that its decision was “adequately explained,” especially given that the burden on CAFOs to comply with the withdrawal rule was admittedly light.⁵⁶ The manure discharged by CAFOs causes significant environmental and health hazards; the decision’s greatest flaw may be the conclusion that the EPA could adequately and efficiently acquire the needed information to regulate CAFOs by solely relying on existing information, which may or may not be readily available.

⁵⁴ 33 U.S.C. § 1318(a)(A).

⁵⁵ *Envtl. Integrity Project*, 2015 U.S. Dist. LEXIS 131653, at *57-58.

⁵⁶ *Id.* at *54.